No. 85-1981

Supreme Court, U.S.
FILED
JUN 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GREGORY MARKETING CORPORATION and DANIEL SCHER,

Petitioners,

—vs.—

WAKEFERN FOOD CORPORATION and RED CHEEK, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT WAKEFERN FOOD CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

JAY N. FASTOW
SANFORD F. REMZ
ROBERT A. MACHSON
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

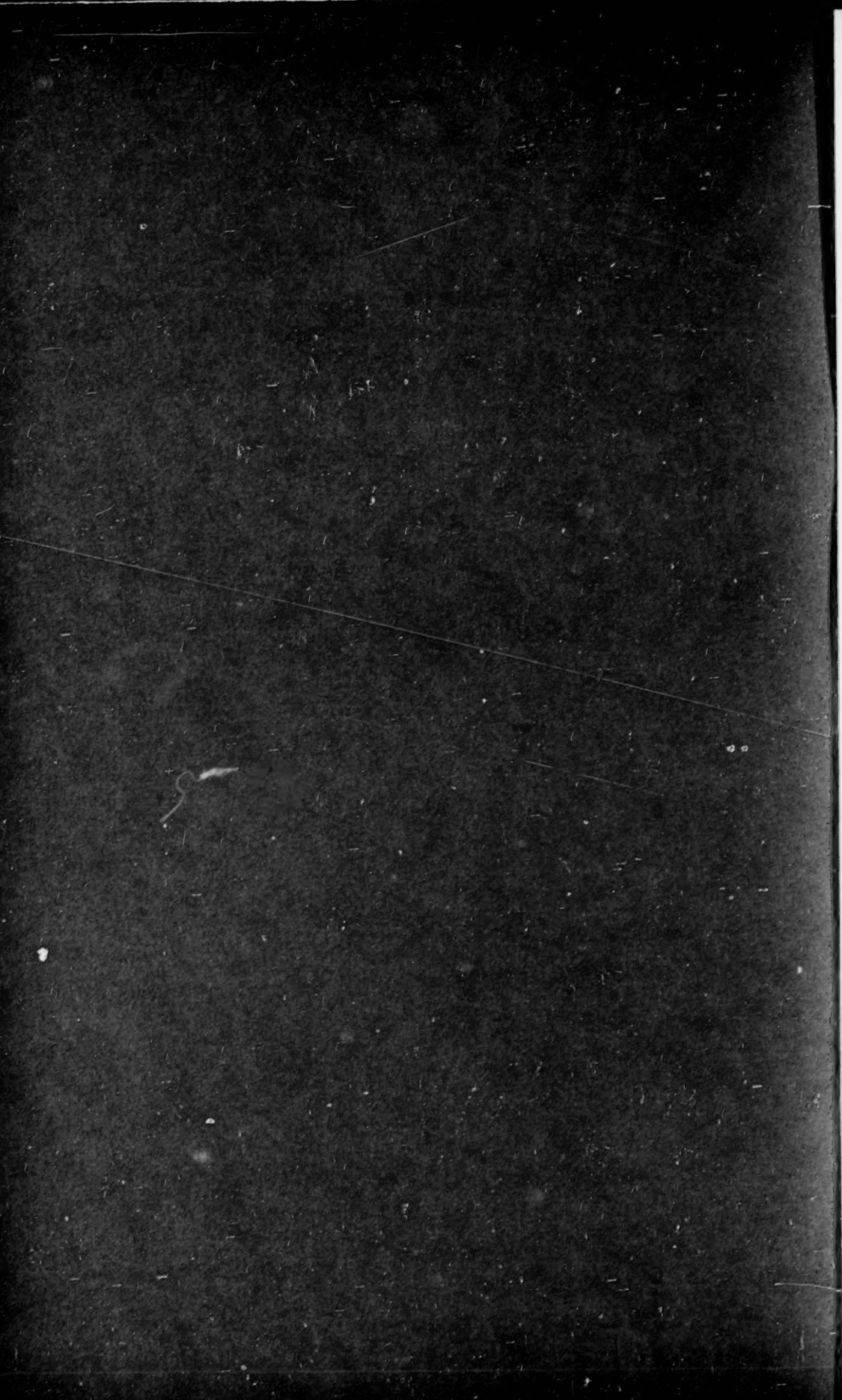
and

FREDERIC K. BECKER
ROGER B. KAPLAN
WILENTZ, GOLDMAN & SPITZER (P.A.)
Plaza 9 Building
P.O. Box 10
Woodbridge, New Jersey 07095
(201) 636-8000

Attorneys for Respondent Wakefern Food Corporation

DENNIS J. BLOCK
767 Fifth Avenue
New York, New York 10153
(212) 310-8187

Counsel of Record for Respondent Wakefern Food Corporation



QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the dismissal, for lack of standing, of a treble damages Robinson-Patman Act price discrimination claim by an independent food broker against an alleged seller and an alleged buyer of apple juice when, *inter alia*, (i) the broker admittedly was neither a consumer nor a competitor in any market of the economy relevant to this action, and (ii) the broker's alleged injury had nothing to do with any claimed reduction in competition, was completely independent of the asserted elements of the alleged Robinson-Patman Act violation and was based solely on a claimed deprivation of contract rights with the alleged seller?

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Authorities	iii
Opinions Below	1
Rule 28.1 Statement	1
Statement of the Case	2
1. The Parties	2
2. The Complaint	2
3. Proceedings Below	3
Summary of Argument	4
Reasons for Denying the Petition	5
I. The Judgment of the Court of Appeals Does Not Present a Conflict in the Circuit Courts	5
II. The Judgment of the Court of Appeals Is Entirely Consistent with the Holding in *Blue Shield of Virginia v. McCready*	7
III. The Issue "Left Open" in *Associated General Contractors* Is Inapplicable Here	8
Conclusion	9

TABLE OF AUTHORITIES

Cases PAGE

Associated General Contractors of California, Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983) 3, 4, 8

Blue Shield of Virginia v. *McCready*, 457 U.S. 465 (1982) 4, 7

Booth v. *Radio Shack Division*, 1982-83 Trade Cas. (CCH) ¶ 65,001 (E.D. Pa. 1982) 5

Callahan v. *Scott Paper Co.*, 541 F. Supp. 550 (E.D. Pa. 1982) 5

Exhibitors' Service Inc. v. *American Multi-Cinema, Inc.*, 788 F.2d 574 (9th Cir. 1986) 6, 7

Klein v. *Lionel Corporation*, 237 F.2d 13 (3d Cir. 1956) 5

Larry R. George Sales Co. v. *Cool Attic Corp.*, 587 F.2d 266 (5th Cir. 1979) 6

Lupia v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979) 6

McNulty v. *Borden, Inc.*, 542 F.Supp. 655 (E.D. Pa. 1982) 5

Ostrofe v. *H.S. Crocker Corp.*, 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded in light* of *Associated General Contractors*, 460 U.S. 1007 (1983), *on remand*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 105 S. Ct. 1155 (1985) 4, 5, 6

Robinson v. *Stanley Home Products, Inc.*, 272 F.2d 601 (1st Cir. 1959) 6

Schoenkopf v. *Brown & Williamson Tobacco Corp.*, 637 F.2d 205 (3d Cir. 1980) 5

PAGE

Statutes and Rules

Section 4 of the Clayton Act, 15 U.S.C. § 15 ..... 3, 7, 8

The Robinson-Patman Act, 15 U.S.C. §§ 13(a) *et seq.* 3, 4, 5

Federal Rules of Civil Procedure, Rule 12(b)(6) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1981

GREGORY MARKETING CORPORATION and DANIEL SCHER,

Petitioners,

—vs.—

WAKEFERN FOOD CORPORATION and RED CHEEK, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT WAKEFERN FOOD CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the Third Circuit Court of Appeals has been reported at 787 F.2d 92.

Rule 28.1 Statement

Wakefern has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

STATEMENT OF THE CASE

The Parties

According to the Complaint, petitioner Gregory Marketing Corporation ("Gregory") is a food broker. (App. at 1, ¶ 1).[1] By its own admission, it is "neither a consumer nor a competitor in any market of the economy relevant to this action . . . ." (P. App. A at 13a.)

Plaintiffs further allege: that Daniel Scher ("Scher") is the president and majority shareholder of Gregory (App. at 2, ¶ 2);[2] that respondent Red Cheek, Inc. ("Red Cheek") manufactures and distributes apple juice and related products (App. at 2, ¶ 4); and that respondent Wakefern Food Corporation ("Wakefern") purchases food and related products on behalf of shareholder members (App. at 2, ¶ 3).

The Complaint

The Complaint alleges that Gregory entered into an agreement with Red Cheek to act as its broker in the State of New Jersey. (App. at 2, ¶ 1). It further alleges: that during February through August 1984, Red Cheek charged Wakefern lower prices for certain apple juice products than it charged other customers (App. at 3, ¶ 3); that Scher became aware of Red Cheek's asserted discriminatory sales to Wakefern; that upon informing "Red Cheek of the wrongful nature of such price discrimination, [he] was directed by Red Cheek to supply other inquiring customers with fabricated explanations as to the justification of such discounting practices" (App. at 3, ¶ 3);

---

1 References to the Petition for a Writ of Certiorari are denoted as "Pet. at ____." References to the Appendices to the Petition are denoted as "P. App. ____ at ____." Petitioners' complaint appears at pages 1 through 7 of the Appendix submitted to the Court of Appeals for the Third Circuit ("App.").

2 Petitioners conceded in the District Court that Scher's claim is entirely derivative of Gregory's, and that he lacks standing. (P. App. A at 4a, n.1).

and that "[s]hortly after Scher refused to comply with the directives of Red Cheek, Red Cheek terminated the brokerage agreement by and between the parties" (App. at 3, ¶ 5).

On the basis of these allegations, the Complaint sought treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, for a claimed violation of the price discrimination provisions in the Robinson-Patman Act, 15 U.S.C. §§ 13(a) *et seq.*[3] The Complaint also asserted state law contract and tort claims.

Proceedings Below

The District Court dismissed petitioners' Robinson-Patman Act claims with prejudice pursuant to Fed. R. Civ. Pro. 12(b)(6). Relying on this Court's decision in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), it held that plaintiffs lack standing under Section 4 of the Clayton Act, noting in part that the Complaint failed to allege the necessary antitrust injury—"injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful." (P. App. B. at 28a).[4]

The Third Circuit affirmed, emphasizing, *inter alia*, that Gregory admittedly was not a participant in any market relevant to this case, that its alleged injury did not result from any asserted anticompetitive effect of the claimed price discrimina-

---

3 The Complaint does not allege any causation between Gregory's purported refusal to provide explanations and Red Cheek's alleged termination of its supposed contract with Gregory. Nor does the Complaint allege that Wakefern had anything to do with the asserted termination of Gregory's claimed brokerage agreement with Red Cheek. Moreover, in listing the statutes involved here, the Petition refers to only one substantive provision: Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). (Pet. at 2). As the alleged purchaser, Wakefern could not violate that statute.

4 After dismissing the Robinson-Patman Act claims, the District Court dismissed petitioners' state law claims for lack of jurisdiction. (P. App. B at 31a). Petitioners do not contend that this dismissal of their state law claims was erroneous.

tion, and that other persons—competitors of the asserted purchaser—were better situated to make any appropriate allegations in this regard. (P. App. A. at 9a, 13a-14a). The court also held that Gregory's participation was not essential to the implementation of the alleged anticompetitive conduct, since Red Cheek could have granted the asserted discounts without even notifying Gregory. (P. App. A at 10a-11a).

SUMMARY OF ARGUMENT

1. The judgment of the Court of Appeals does not conflict with the decision of the Ninth Circuit in *Ostrofe* v. *H.S. Crocker Co.*[5] In contrast to the situation in *Ostrofe*, under the allegations of the Complaint: (i) petitioners' federal antitrust claims do not invoke the Sherman Act, but are brought only under the Robinson-Patman Act, with its more limited competitive objectives; (ii) Gregory was by no means an "essential participant" in the alleged antitrust violation; (iii) Gregory is an independent food broker, not an employee of any defendant; and (iv) other persons—the competitors of the alleged purchaser—were in a position (indeed, a better position) to complain of any alleged anticompetitive acts.

2. The decision in *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), in no way rejected the significance in an antitrust standing analysis of plaintiff's participation and injury in the relevant market, or abolished the antitrust injury criteria. The subsequent decision in *Associated General Contractors*, *supra*, confirms the importance of these factors with regard to antitrust standing.

3. Far from falling within the issue purportedly "left open" in *Associated General Contractors*, petitioners' claims are governed by, and were properly dismissed under, that decision.

---

5 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded in light of Associated General Contractors*, 460 U.S. 1007 (1983), *on remand*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 105 S. Ct. 1155 (1985).

REASONS FOR DENYING THE PETITION

I. THE JUDGMENT OF THE COURT OF APPEALS DOES NOT PRESENT A CONFLICT IN THE CIRCUIT COURTS

Petitioners attempt to portray the judgment below as presenting a conflict with the decision of the Ninth Circuit in *Ostrofe* v. *H.S. Crocker Co.*, *supra*. In *Ostrofe*, the Ninth Circuit granted standing to a former employee of the defendant, who claimed that he was forced to resign from his job because he refused to implement a company price-fixing and market division scheme in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. This case is entirely distinguishable from *Ostrofe*.

Whereas *Ostrofe* involved a claim under Section 1 of the Sherman Act, with its various conspiracy doctrines, the instant claim is brought under the price discrimination provisions in the Robinson-Patman Act. At most, only a purchaser or a competitor injured by an unlawful discriminatory sale can suffer harm of the type those provisions were designed to prevent.[6] Under its own allegations, Gregory is not so situated. And, Robinson-Patman Act claims brought by terminated employees have consistently been dismissed for lack of antitrust standing.[7]

Moreover, unlike the plaintiff in *Ostrofe*, Gregory was not, under its own allegations, an "essential participant" in the alleged anticompetitive conduct. As the Third Circuit held, under the allegations of the complaint, Red Cheek could have "provided Wakefern with special discounts, but simply absorbed the loss itself and neither told Gregory nor demanded

---

6 *See Schoenkopf* v. *Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210-11 (3d Cir. 1980); *Klein* v. *Lionel Corporation*, 237 F.2d 13, 15 (3d Cir. 1956).

7 *See McNulty* v. *Borden, Inc.*, 542 F. Supp. 655 (E.D. Pa. 1982); *Callahan* v. *Scott Paper Co.*, 541 F. Supp. 550 (E.D. Pa. 1982); *Booth* v. *Radio Shack Division*, 1982-83 Trade Cas. (CCH) ¶ 65,001 (E.D. Pa. 1982).

that the broker fabricate an explanation for other customers. . . ." (P. App. A at 11a).

Gregory is also unlike the plaintiff in *Ostrofe* in that Gregory is not an employee of any defendant, but is an independent food broker. As the District Court recognized:

> An employer-employee relationship is quite different from that between a broker and seller. Much of the *Ostrofe* rationale rests on the fact that an employee is forced [sic] with the choice of either participating in an unlawful scheme or forfeiting employment. No such choice exists here where a broker is either free to find other accounts or distance himself from the unlawful scheme.

(P. App. B at 30a).

Furthermore, in *Ostrofe* the terminated employee was the only person in a position to complain of the alleged anticompetitive acts, because that conduct assertedly had been concealed. In contrast, petitioners have asserted that other purchasers of apple juice—who are better situated to bring any appropriate claim of this nature—made inquiries as to the pricing of Red Cheek apple juice. (Pet. at 3; App. at 3, ¶ 3).

Far from issuing conflicting decisions, the circuit courts have been unanimous in dismissing for lack of standing antitrust actions brought by brokers based upon alleged violations in markets in which they did not participate. *Larry R. George Sales Co.* v. *Cool Attic Corp.*, 587 F.2d 266, 271-72 (5th Cir. 1979); *Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979); *Robinson* v. *Stanley Home Products*, 272 F.2d 601 (1st Cir. 1959).

Moreover, in *Exhibitors' Service, Inc.* v. *American Multi-Cinema, Inc.*, 788 F.2d 574 (9th Cir. 1986), the Ninth Circuit recently ordered the dismissal for lack of standing of a claim brought under Section 1 of the Sherman Act by a motion picture licensing agent that allegedly was terminated as a result of an unlawful agreement between two motion picture exhibitors. Distinguishing its previous decision in *Ostrofe* on the ground, *inter alia*, that plaintiff there—unlike the broker

here—was an "essential participant" in the alleged anti-competitive conduct, the Ninth Circuit held that:

> [E]xamining the nature of ESI's injury, we find it was not of "the type the antitrust laws were intended to forestall." [Citation omitted]. As with the union in *Associated General Contractors*, ESI is neither a consumer of defendants' goods or services nor a competitor of the defendants in the restrained market. See 459 U.S. at 538-39.

Id. at 578-79.

Thus, petitioners' effort to create a conflict among the circuits fails.

II. THE JUDGMENT OF THE COURT OF APPEALS IS ENTIRELY CONSISTENT WITH THE HOLDING IN BLUE SHIELD OF VIRGINIA v. McCREADY

Petitioners also argue that the decision in *Blue Shield of Virginia* v. *McCready, supra*, "rejected the requirement that the plaintiff be a consumer or competitor to have standing to sue under Section 4 of the Clayton Act," and denounced the view that plaintiff's injury must "reflect the 'anticompetitive effect' " of the violation. (Pet. at 5). Far from rejecting these principles, the Court in *Blue Shield* stressed that a plaintiff must demonstrate a sufficient "relationship [between] the injury alleged [and] those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful." 457 U.S. at 478.

Plaintiff in *Blue Shield* was a consumer in the market in which the alleged restraint occurred, and her injury was "inextricably intertwined" with the injury defendants there sought to inflict on that market.[8] In the language quoted by petitioners, she was a victim "of the forbidden practice,"[9] *i.e.*, had suffered antitrust injury. As described above, under its own allegations, Gregory does not stand in her shoes.

---

8 *Blue Shield*, 457 U.S. at 480, 484.

9 Pet. at 5, *quoting Blue Shield*, 457 U.S. at 472.

In any event, the Court's later decision in *Associated General Contractors* emphasizes the importance in a Section 4 standing inquiry of the plaintiff's participation and injury in the relevant market, and expressly includes antitrust injury in its criteria for antitrust standing. 459 U.S. at 538-40. Petitioners' second argument thus fails.

III. THE ISSUE "LEFT OPEN" IN ASSOCIATED GENERAL CONTRACTORS IS INAPPLICABLE HERE

Petitioners' last argument is that the Court should address here the issue "left open" in footnote 44 of its decision in *Associated General Contractors*, 459 U.S. at 541 n.44. Petitioners mischaracterize that issue, which in any event gives them no assistance. That footnote states as follows:

> [T]he Union was not a participant in the market for construction contracts or subcontracts nor a direct victim of the defendants' course of practices. We therefore need not decide whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market.

Id. Since Gregory is, under its own assertions, neither a participant in any market relevant to this case, nor a direct victim of defendants' alleged anticompetitive practices, there is likewise no need to decide that issue here. Nor would that issue be applicable in any event, since plaintiffs do not allege a boycott claim. As the courts below held, the decision in *Associated General Contractors* disposes of petitioners' claims.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DENNIS J. BLOCK
767 Fifth Avenue
New York, New York 10153
(212) 310-8187

Counsel of Record for Respondent Wakefern Food Corporation

Of Counsel:

JAY N. FASTOW
SANFORD F. REMZ
ROBERT A. MACHSON
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

and

FREDERIC K. BECKER
ROGER B. KAPLAN
WILENTZ, GOLDMAN & SPITZER
Plaza 9 Building
P.O. Box 10
Woodbridge, New Jersey 07095
(201) 636-8000

Attorneys for Respondent Wakefern Food Corporporation